Client Alert

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Whitelisting Violates German Unfair Competition Act

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On 24 June 2016, the long-awaited decision on ad blocking software was adopted by the Higher Regional Court of Cologne (6 U 149/15 – Axel Springer./.Eyeo). This is the first decision on the subject matter taken by an Appellate Court in Germany, and it is a decision that takes a critical view on ad blocking software applications with so-called *whitelisting*. The judgment is in favor of claimant Axel Springer, Germany's largest publishing house and provider of online content, and it limits the activities of ad blocking provider Eyeo GmbH. The decision will further fuel the debate that recently reached a preliminary peak, with the commission on media convergence (*Bund-Länder-Kommission zur Medienkonvergenz*) proposing a prohibition of ad blocking software to secure media diversity.

1. CONTEXT

Eyeo is the market leader in the distribution of software that enables the end user to consume website content without advertising being displayed. The current decision relates to ad blocking software with the so-called *whitelisting* function, i.e., software that allows for the inclusion of companies complying with so-called "acceptable ad" requirements in a list of companies that will not be blocked. In certain cases, website providers are additionally required to pay a fee in the form of a 30% participation in ad sales receipts. This is required for all advertisements reaching more than 10 million additional ad impressions within one month while remaining unblocked. According to Eyeo, this is the case for about 10% of all blocked promoted companies. The agreement on the *whitelisting* of such companies and the payment of the fee is concluded between Eyeo and the provider of the website on which the ad is published. The promoted companies themselves cannot enter into agreements with Eyeo, as the latter evaluates the specific integration of ads within the context of individual websites based on "acceptable ad" requirements. Courts have repeatedly ruled that ad blocking software in general does not infringe the law and have most often extended this reasoning to include *whitelisting* as well. The significance of the matter is mirrored in a proposal by the Federal-State Commission dated June 17, 2016, to assess the necessity of prohibiting ad blocking software. The initiative outlines the media's desire for regulation of this matter with judicial proceedings lasting too long.

2. NEW ASPECTS

In the current case, the claimant argued that it was dependent on ad sales to finance its online content, as consumers were not prepared to pay for "advertisement-free" content. The Appellate Court held that *whitelisting* violated a statutory provision amending the *German Unfair Competition Act* which was enacted only in December 2015. The rule prohibits so-called aggressive commercial actions that are suited to prompt market participants into decisions they would not have made otherwise. "*Aggressive action*" relates to an action that is suited to significantly restrict the freedom of choice of market participants by way of importunity, coercion or undue influence. Undue influence is defined as an entrepreneur *exploiting a position of power* so as to apply pressure in

a way that is suited to materially limit the freedom of the market participant to make a decision. The judgment at hand was the first opportunity a court has had so far to evaluate the legal dispute surrounding ad blocking software in consideration of the new provision.

3. MAIN ARGUMENT

The court qualified *whitelisting* as "some form of arrest that website providers had to buy themselves out of." It further classified Eyeo as an entrepreneur *exploiting a position of power*. The defendant had argued that Eyeo had no *position of power*, as the software was only installed on 5% of all end user devices. The court concluded, however, that the rule did not require a market *dominating* position – as would have been a prerequisite for antitrust law. It felt that a *position of power* was already sufficiently established in the current case by the fact that Eyeo had entered into agreements with companies such as Google, Amazon and Microsoft and persuaded other companies producing ad blocking software to also join the "acceptable ad" approach as well.

4. CONSEQUENCES

The decision represents an important new development in the dispute on the legality of ad blocking software – but it does not close the discussion on this topic. Not only are there already further proceedings pending against Eyeo with parties emphasizing their intent to have the matter conclusively decided by the Federal Court of Justice, but also the applicability of the new rule will prove to be the subject of heated discussions, as antitrust law may potentially be enjoying primacy of application. Should courts decide to uphold this decision, it will still be permitted to distribute ad blocking software without the *whitelisting* function. Yet, the main source of income, i.e., participation in ad sales receipts of whitelisted advertisements, would fall away. And even if courts decided conclusively in favor of Eyeo, in the end state regulation may limit ad blocking software in the future in order to ensure the financing of journalistic content.

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